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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

REPLY OF GRAFTON & UPTON RAILROAD COMPANY IN OPPOSITION TO PETITION FOR DECLARATORY ORDER

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Dated: August 20, 2012

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INTRODUCTION

As demonstrated below, this case presents a classic demonstration of the reason for the enactment and application of the preemption provisions of 49 U.S.C. 10501. Grafton & Upton Railroad Co. ("G&U") has recently expanded its operations at its yard in Upton, Massachusetts in order to handle the transloading of various bulk commodities. G&U has worked with the Town of Upton to explain that local regulations requiring preclearance or permitting are preempted, but, at the same time, G&U has been forthcoming and fully cooperative with the Town in order to comply with regulations designed to protect the health and safety of residents of Upton.

The Town, speaking through its highest elected body--the Board of Selectman--agrees with G&U that preemption applies. The Petitioners in this matter, however, 7 disgruntled residents of Upton who live close to the transloading yard, are seeking to defy

the decision of the Board of Selectmen and are attempting, through their Petition to the Board, to impose their will and to subvert the greater public interest as determined by their elected representatives. The Petitioners are attempting to create a controversy where none exists.

Why would the Petitioners ask the Board to determine that preemption does not apply in this situation? The only conceivable inference is that they want to shut down rail operations at the yard. This is not an altruistic attempt to promote the public interest, to protect the health or safety of residents of the town, or even an academic exercise to define the scope of preemption. Rather, the Petitioners are trying to avoid preemption solely in the hope that the Planning Board or the Zoning Board of Upton will find some reason why G&U should not be able to provide transloading services at the yard. Congress enacted the preemption provisions, and the Board and the courts have enforced them, precisely in order to preclude such pretextual efforts of local regulation of rail operations.

As demonstrated below, the Petitioners lack standing to bring the Petition, which raises a host of local and state law issues, such as the failure to exhaust administrative remedies, that make the request to institute a declaratory order proceeding entirely premature. More importantly, however, a review of the facts and arguments in the record at this time will lead the Board to the conclusion that there is no controversy or dispute, that preemption in fact applies and that a declaratory order proceeding is unnecessary.

BACKGROUND AND FACTS

G&U and the Transloading Yard

G&U was incorporated in 1873 and has been in continuous operation since that time. The line of G&U extends approximately 16.5 miles between North Grafton, Massachusetts, where it connects and interchanges with CSX Transportation, and Milford, Massachusetts, where it also connects with a line of CSX. Prior to 2008, the business and operations of G&U had diminished considerably. In 2008, however, Jon Delli Priscolli purchased all of the outstanding stock of G&U and began to invest in the infrastructure and to generate new business opportunities for G&U. Verified Statement of Jon Delli Priscoli ("Delli Priscoli VS") at pages 1-2.

With resources provided by Mr. Delli Priscoli, the first 7 miles of the line between North Grafton and Upton, Massachusetts were substantially rebuilt, replacing most of the ties and rail. Delli Priscoli VS at page 2. Most significantly, however, as described below, G&U has substantially expanded its pre-existing yard in Upton.

In 2008, Mr. Delli Priscoli, became aware that the Upton Development Group ("UDG") owned approximately 33 acres of property that is immediately adjacent to the original G&U yard in Upton. A portion of the property had been used for years by the Town of Upton as a landfill, and other parts of the property had been used historically as a sand and gravel facility. The property was subject to a remediation order issued by the Massachusetts Department of Environmental Protection ("DEP"), and UDG was in the process of performing the remediation work. In March, 2008, citizens of the Town of Upton voted at a special town meeting not to purchase the property from UDG. Verified Statement of Stanley Gordon ("Gordon VS") at pages 1-2.

Shortly after the town declined to acquire the property, Mr. Delli Priscoli approached UDG with an offer to purchase the property. The end result was that Mr. Delli Priscoli became a one third partner in UDG. Simultaneously with the acquisition of his partnership interest, UDG entered into a long-term lease of the property to G&U, which included an option to purchase. The lease affords G&U the right to use the property for rail transportation purposes and to make investments and improvements for rail operations in its discretion. Gordon VS at page 2. The lease is being filed under seal as a highly confidential document.

UDG's remediation activities are still in process, subject to the review and supervision of the DEP. As of this time, UDG has expended approximately $1.5 million to remediate the environmental problems created by the town's landfill. G&U has deferred the exercise of its option to purchase until the completion of the remediation work, which is expected to be occur in 2013. Gordon VS at page 2.

With its acquisition and control of the property through the lease and option to purchase, G&U developed a plan for expanding its existing yard by improving the property and turning it into a larger rail-truck transload facility. Delli Priscoli VS at pages 2-3. The plan included the construction of a number of yard tracks that could accommodate railcars handling bulk materials, both dry and liquid, and a wood pellet transloading facility that could receive wood pellets shipped in bulk in hopper cars and transfer them to trucks for further distribution.

As these plans were being developed, Mr. Delli Priscolli shared his ideas and goals with officials of the Town of Upton, including the Board of Selectmen, the Board of Health, the Conservation Commission and the fire and police departments. He also

advised the various Town departments that local and state zoning and land use regulations, which would otherwise require preclearance or approval for construction projects by non-railroad entities, were preempted by federal law and that he would not be filing applications for approval. Mr. Delli Priscoli also made it clear, however, that he would comply with the substance of state and local regulations intended to protect the health and welfare of citizens, such as building codes. G&U was completely forthcoming and open with the Town's agencies and their various officials in terms of providing notice and information concerning the plans for the yard. Delli Priscoli VS at pages 2-3.

G&U has been particularly sensitive to the expressions of concern by certain residents of Upton who have homes close to the rail yard, including the Petitioners. Although not required to do so, G&U has constructed berms and planted trees that insulate and separate the rail yard from nearby homes. The berms and trees are well illustrated in several of the photographs submitted by the Petitioners. Ms. Del Grosso, one of the Petitioners, sent Mr. Delli Priscoli an e-mail thanking him for constructing the berm. Delli Priscoli VS at page 4 and Exhibit A attached to the Delli Priscoli VS.

The Terminal Transloading Agreement

G&U's expansion of the yard was intended to enable G&U to increase its rail traffic to and from the yard by enabling G&U to offer to transload a variety of commodities that are shipped in bulk railcars and tankers. Such commodities include chemicals and petroleum products, but also include food grade materials and wood pellets. In order to be in a position to solicit such business and to perform the transloading operations, G&U, as a small rail carrier with only a few employees, looked for a contractor that might be able to perform the transloading functions at the yard.

G&U entered into discussions with Ronald Dana, the principal of various companies involved in the transportation of bulk commodities and related services. Delli Priscoli VS at pages 4-5. The Dana family of companies has vast experience in motor carrier transportation as well as transloading operations involving bulk commodities. Verified Statement of Ronald Dana ("Dana VS") at pages 2-3. Discussions between G&U and Dana resulted in the execution of a Terminal Transloading Agreement dated as of December 30, 2010 (the "Agreement" or the "Terminal Transloading Agreement"). The Agreement is being filed under seal as a highly confidential document.

For purposes of entering into and performing the Terminal Transloading Agreement, Mr. Dana formed a new, special-purpose company named Grafton Upton Railcare LLC ("Grafton Upton Railcare"). Dana VS at page 1. The Agreement states that Grafton Upton Railcare will provide transloading services "for and under the auspices and control" of G&U at the G&U railyard in Upton. Grafton Upton Railcare is required to perform necessary transloading services, including providing equipment and employees necessary for transloading and arranging for motor carrier service if customers do not make such arrangements themselves. As the agent of G&U, Grafton Upton Railcare bills and collects from G&U's customers for the transloading services performed at the yard. The transloading charges are set forth in G&U's tariff. In return for the performance of these services, G&U compensates Grafton Upton Railcare. Gordon VS at pages 2-4.

In negotiating and drafting the Terminal Transloading Agreement, G&U was highly sensitive to the principles of federal preemption, as articulated by the Board and the courts. Gordon VS at pages 2-3; Delli Priscoli VS at page 5. In particular, the

Agreement was modeled after an agreement between Norfolk Southern and its subcontractor at a propane transfer facility in the Alexandria, Virginia that was the subject of preemption litigation in The City of Alexandria, Virginia--Petition for Declaratory Order, STB Finance Docket No. 35157. Gordon VS at pages 2-3.

The Terminal Transloading Agreement prohibits Grafton Upton Railcare from using the yard for any purposes or activities other than transloading for customers of G&U and includes a specific prohibition against conducting any independent business for the account of Grafton Upton Railcare. Stated somewhat differently, Grafton Upton Railcare may deal only with rail customers of G&U that require a line haul rail movement prior to or subsequent to transloading activities at the yard. G&U is entitled to use the entire yard at any time for any purpose in its sole discretion so long as such use does not unreasonably interfere with the transloading activities. No portion of the yard is leased to Grafton Upton Railcare. The Agreement has a 2 year term, but G&U may terminate the Agreement for any reason on 60 days' notice. Gordon VS at pages 3-4.

G&U has marketed the transloading services and capabilities at the Upton yard as an integral part of the rail transportation services offered by G&U. Verified Statement of Eric Moffett ("Moffett VS") at pages 1-2. G&U has published brochures promoting the Upton yard and its transloading possibilities, and the G&U website includes the same information. The transloading yard is an "open" facility that is available to any rail customer that wishes to move freight between Upton and the connection with CSX at North Grafton. Moffett VS at page 2.

The "Dana Companies"

Mr. Dana owns or controls a number of different companies, many of which were referred to in the Petition as the "Dana Companies". As explained below, these companies are separate entities that perform various functions not involving transloading at Upton. Grafton Upton Railcare, as noted above, was formed specifically and exclusively for the purpose of providing transloading services for G&U at the Upton yard. Dana VS at page 1. More importantly, as described below, none of the other Dana entities is a customer of G&U or has any contractual relationship with G&U. Dana VS at page 4.

Dana Transport, Inc. is a trucking company that currently provides trucking services to some of the customers that do transloading business at the Upton yard. Dana Transport does not get involved in the transloading, which is done exclusively by Grafton Upton Railcare, and Dana Transport has no contractual or other direct relationship with G&U. Dana VS at page 2, 5. Furthermore, Dana Transport is used for trucking services for only 25% of the truckloads leaving the yard at Upton. Polselli VS at page 3. The customers, not G&U or Grafton Upton Railcare, choose the trucker that they wish to use. Verified Statement of Michael Polselli ("Polselli VS") at pages 2-3; Moffett VS at page 2.

Other "Dana Companies" mentioned by the Petitioners, including Dana Rail Care, which is a marketing name rather than a legal entity, Liquid Transport Corp., International Equipment Leasing, Inc., and Suttles Truck Leasing LLC, are not involved in the transloading services provided by Grafton Upton Railcare and are not customers of G&U. Dana VS at pages 3-4. Significantly, Dana does not view the G&U yard at Upton

as a "Dana Companies" facility in any respect. The yard is not even referred to, much less promoted, on the Dana website. Dana VS at page 5.

G&U-Town of Upton Relationship

As the development of the yard progressed, there were continuing conversations between G&U and Town officials concerning the question whether local land use and planning approvals were required or, conversely, preempted. Delli Priscoli VS at pages 3-7. The town retained counsel specifically for the purpose of obtaining advice with respect to preemption and its scope. G&U agreed to reimburse the town for the expense of obtaining such advice, which was set forth in a detailed memorandum in June, 2009. Delli Priscoli VS at pages 3-4. Based on such advice, the Board of Selectmen appropriately took no action to challenge the proposition that federal preemption applied to the activities of G&U at the yard. Delli Priscoli VS at pages 3-4.

During the period from 2009 to the present time, G&U has continued to cooperate with the Town and its agencies concerning the activities and operations at the yard. G&U has permitted inspections and has provided information as requested. The relationship between G&U and the Board of Selectmen, the Board of Health, and the fire and police departments has been extraordinarily constructive and professional. The fire department, for example, has been satisfied that G&U has taken steps and formulated plans to prevent and address any potential accidents or releases of hazardous materials. Delli Priscoli VS at pages 3-4.

The DEP has also inspected the yard and has determined that, aside from the continuing remediation by UDG of the portion of the property that was used as a landfill, the DEP is satisfied with the operations and has no role to play in any continuing

supervision of the yard. Indeed, a DEP employee who inspected the yard in 2011 wrote that "railroad officials have taken protective measures in areas of potential environmental concerns" and that "the railroad and the Upton Board of Health (and other local officials) have a good working relationship." Memorandum dated June 15, 2011 by Jon F. Kronopolus of DEP, Petitioners' Exhibit 29 at pages 125-126.

Significantly, from the perspective of the safety of transloading operations generally and hazardous materials in particular, the Federal Railroad Administration ("FRA") has inspected the yard on a regular basis and has not noted any problems. Indeed, as a result of continuing complaints from unnamed town residents, the FRA has indicated that it has inspected the Upton facility many more times than other similar rail facilities. Delli Priscoli VS at page 5.

Notwithstanding the view of the Board of Selectmen that federal preemption applied, certain Town residents and certain members of the Planning Board of Upton continued to suggest that the Town should take steps to study the issue further, including making a request to the Board to determine whether preemption applied. In response to these suggestions, the Board of Selectmen created a railroad fact-finding committee in August, 2011 and charged it with the responsibility to investigate thoroughly the activities of G&U at the yard. Delli Priscoli VS at pages 6-7. The committee included a member of the Board of Selectmen, a member of the Board of Health, a member of the planning Board, and 2 members of the public. The committee released a report in June, 2012 consisting of several hundred pages of questions and answers, many of which were directed to and supplied by G&U. Delli Priscoli VS at page 6.

One of the Petitioners, Ms. Del Grosso, was initially a member of the committee, but she withdrew from participation without explanation. The draft report suggested that 2 members of the committee believed that preemption precluded the enforcement of local zoning and land use regulations and that the 2 other members were of the view that an opinion from the Board should be sought. Delli Priscoli VS at page 6. The Board of Selectmen has considered the report and has recently reaffirmed its earlier conclusion that preemption applied, deciding that the Town would not pursue any action at the STB. Delli Priscoli VS at page 6 and Exhibits B and C attached to the Delli Priscoli VS. As noted by the Petitioners, the Board of Selectmen also concluded that the town bylaws prevented other town agencies, such as the Planning Board, from hiring counsel to file a petition with the Board.

The activities at the yard have resulted directly in employment for approximately 70 people and has produced related economic activity that is beneficial to the Town of Upton. The business activity generated by the yard has contributed to the economy of Upton and the surrounding area. Delli Priscoli VS at page 7. The relationship between G&U and the Town was aptly summarized at the meeting of the Board of Selectmen on August 7, 2012 when the Chairman of Board, in reaffirming the Board's conclusion that preemption applied and that the Town should take no action, told Mr. Delli Priscoli that "you've been a very good partner, Jon" and Mr. Delli Priscoli replied "so has the town". Delli Priscoli VS at page 7 and Exhibit B attached to the Delli Priscoli VS.

Wood Pellet Transloading

Several rail customers of G&U ship wood pellets to the yard for transloading. The pellets are manufactured or purchased by the rail customer and shipped in hopper

cars to the G&U yard, where the hopper cars are emptied into silos. The pellets are then loaded into bags weighing 40 pounds each, and the bags are placed on pallets, shrink-wrapped and placed on trucks for further movement. No processing or manufacturing is performed, or is necessary, as part of the transloading process. Moffett VS at pages 3-5; Polselli VS at pages 3-4. As described below, this method of handling wood pellets has proven to be an efficient and lower cost means of transportation for pellet producers.

The 40 pound bags tend to break during shipment in boxcars unless they are shrink-wrapped and palletized, which requires additional space for the the pallets and the materials required to block and brace the pallets to prevent movement. Moffett VS at page 3. Hopper cars, on the other hand, can be filled to capacity with pellets, and there is no need to take any measures to protect bags or pallets. Moffett VS at pages 3-4. One of G&U's pellet customers, Viridis Energy, Inc. ("Viridis"), estimates that it is possible to ship 20 more tons of pellets in a hopper car than would be possible in a boxcar. Verified Statement of Douglas Middleton ("Middleton VS") at pages 2-3 As a consequence, the transportation cost borne by the pellet shippers is minimized and the risk of loss and damage is reduced. Viridis, which manufacturers its pellets in British Columbia, has opted to use a hopper cars moving to Upton "as a matter of transportation logistics, lowering transportation costs and minimizing damage expense" in order to remain competitive in the New England market. Middleton VS at pages 2-3.

At the present time, G&U has several customers that ship wood pellets to the Upton yard. Neither G&U nor Grafton Upton Railcare has any contractual relationship with any of these wood pellet shippers--the only relationship is as a rail transportation provider for the customer. Moffett VS at page 5; Middleton VS at page 3.

As noted above, Viridis is one of the pellet customers using the Upton transloading facility. Notwithstanding the advertising claims of Viridis, there is no contractual "partnership" relationship with G&U or any company owned or controlled by Mr. Dana relating to transloading services. The relationship consists of a rail customer arranging to ship by rail and transload wood pellets at Upton. Moffett VS at page 5; Middleton VS at page 3.

Current Operations at the Yard

At the present time, the G&U transloading yard has 4 unloading tracks totaling approximately 2000 feet and the pellet transloading facility. Delli Priscoli VS at page 4. G&U serves approximately 15 customers at the yard, transloading various types of bulk liquids, such as soybean oils, biofuels, solvents, nitric acid, phosphorous acid, styrene and alcohols, as well as wood pellets. In July, 2012, 84 railcars were transloaded at the yard, 6 of which were hopper cars with wood pellets. The other 78 cars contained the types of liquid bulk materials mentioned above. Polselli VS at page 2.

ARGUMENT

I. The Petitioners Lack Standing.

The Petitioners in this matter are residents of Upton who live on streets that are adjacent to the transloading yard.[1] They allege simply that they are "aggrieved", but they have provided no factual basis to support such an allegation or any description of any actions by G&U, or anyone else for that matter, that would lead to the conclusion that the Petitioners are in fact "aggrieved". There is no allegation, for example, nor could there be, that operations at the transloading yard are unsafe or threaten the health or well-being

[1] The Petition refers to each of the Petitioners as being an "owner" or "tenant", but property records indicate that title to certain of the properties is in the name of entities other than the Petitioners who allege to be "owners". Gordon VS at pages 4-5.

of neighbors. More importantly, however, as explained below, even if the Petitioners are in some manner "aggrieved", it does not afford them standing to file the Petition.

As described above, the elected representatives of the Petitioners, the Board of Selectmen of Upton, have extensively reviewed the question whether preemption applies and have definitively concluded that it does and that resort to the Board is unnecessary. A fact-finding committee appointed by the Board of Selectmen, and initially including Ms. Del Grosso, one of the Petitioners, has exhaustively studied this matter, along with legal counsel representing the Town, and the Board of Selectmen has reaffirmed its original opinion to the effect that application or attempted enforcement of the town's regulations are preempted. Delli Priscoli VS at pages 6-7.

The Petitioners have admitted that they are seeking to supplant the Board of Selectmen and its decision. In asking for a waiver of the filing fee for the Petition, the Petitioners stated that "they have initiated this action in lieu of enforcement by the Town of Upton" and that they are "seeking to vindicate the rights of the municipality." In fact, they are acting contrary to the interests of the Town, as expressed by the Board of Selectmen. The Petitioners represent no one except themselves and have staked out a position that is contrary to the public interest as determined by their elected officials.

The Petitioners are attempting to bring this proceeding, therefore, without even attempting to demonstrate how they are "aggrieved" and contrary to the determination of their elected representatives. In these circumstances, the Board should determine that the Petitioners lack standing to pursue the Petition.

II. Initiation of a Declaratory Order Proceeding is Premature Due to a Failure to Exhaust State Law Remedies and a Lack of Any Controversy.

As the Board has stated on many occasions, a declaratory order proceeding is appropriate in order to terminate a controversy or remove uncertainty. The Board has broad discretion in deciding whether to institute a declaratory order proceeding and may take into account a variety of factors, including the ripeness of the alleged controversy. Generally, the Board does not regulate the construction or operation of yard facilities. 49 U.S.C. 10906. In cases involving transloading yards, the Board has provided advice as to whether preemption might apply, but it generally has not had direct involvement in the adjudication of these issues. As a consequence, the interpretation of preemption requirements in cases involving transloading yards has evolved largely through court decisions in situations in which the courts have sought the Board's advice and expertise. See, e.g., Borough of Riverdale--Petition for Declaratory Order--The New York, Susquehanna and Western Railway Corp., STB Finance Docket No. 33466 (served September 10, 1999). Furthermore, the Board has consistently stated that it is not the appropriate forum for the adjudication of issues arising under state law.

As described above, there is no controversy or uncertainty between G&U and the Town of Upton. The preemption issues have been thoroughly vetted by the Town, and it agrees with G&U that preemption applies. The Town has not threatened to attempt to enjoin operations at the yard or to otherwise interfere with G&U's rail operations. There has been no attempt by any agency of the Town to enforce any regulations or codes. There has been no court action challenging the transloading operations, and no court has asked for the Board's opinion in this matter. Moreover, G&U has cooperated fully with

the Town and has complied with the substance of regulations relating to public health and safety.

The only alleged controversy or uncertainty is a figment of the imagination of 7 residents of the Town. Indeed, the fundamental question, and perhaps the only question, raised by the Petition is whether 7 residents have the ability to override and ignore the decision of the Town's elected representatives or, in their words, to "vindicate the rights" of the Town that are purportedly threatened by "municipal inaction". In proceeding in this fashion, the Petitioners have wholly ignored their remedies under state law.[2]

Specifically, the Petitioners have failed to exhaust potential administrative remedies under Massachusetts law. M.G.L. ch. 40A provides avenues for "aggrieved" persons to challenge administratively, and obtain judicial review of, decisions relating to the use of property. Any person, whether or not "aggrieved", has the ability to challenge a town's decision not to act with respect to a zoning or land use issue. See M.G.L. ch. 40A, sec. 7. In order to appeal to the courts, however, a person must be "aggrieved", which entails a showing, based upon persuasive facts, not speculation or personal opinion, that their alleged injury is special and different from the concerns of the rest of the community. M.G.L. ch. 40A, sec. 17; Warrington v. Zoning Board of Appeals of Rutland, 78 Mass. App. Ct. 903 (2010); Boston Outdoor Ventures, LLC v. Aikens, 2011 WL 1601539 (Land Court, April 25, 2011); Marshalian v. Zoning Board of Appeals of

[2] They may also have ignored potential avenues of action under the town's bylaws. A member of the Planning Board suggested at a Planning Board on July 17, 2012 meeting that town residents had the right to recall members of the board of selectmen or to override the decision of the Board by means of a town meeting.

Newburyport, 421 Mass. 719 (1996); Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20 (2006).[3]

The Petitioners have cited several potential Upton zoning and land use regulations that might be applicable to the G&U yard in the event that the STB were to determine that preemption is not applicable. These regulations involve a special permit or variance to be issued by the Upton Zoning Board of Appeals or a site plan review by the Planning Board. The Petitioners, however, have not attempted to use the administrative remedies potentially available under Massachusetts law to address the issues they have identified.[4]

There are currently no attempts to regulate G&U's activities at the yard, and consequently there is no controversy. Moreover, there are potential administrative remedies and issues of state law that should be resolved by appropriate agencies and courts in the Commonwealth of Massachusetts before the Board agrees to take on a declaratory order proceeding that would permit these Petitioners, in effect, to bring a derivative action on behalf of a town that has opted through the decision of its elected officials not to proceed before the Board.

III. There is No Substantive Basis to Grant the Petition.

At this point in time, the law of preemption under 49 U.S.C. 10501 has been developed and refined substantially through numerous decisions of the Board and various courts. As the Petitioners have correctly recognized, state and local regulation is

[3] These decisions may explain why the Petitioners have alleged that they are "aggrieved" without asserting any specific facts to demonstrate that they have special damages that are different from the concerns of the rest of the residents of Upton. In any event, the Petitioners have state law remedies that should be asserted and exhausted before the Board is asked to issue a declaratory order that, if granted, would have the effect of sending the Petitioners back to the very avenues of potential relief that are open to them right now.

[4] This failure is even more curious, because Ms. Del Grosso, one of the Petitioners, states in her affidavit that she was at one time a building inspector in Upton. Presumably, therefore, she is familiar with the applicable statutes and regulations.

preempted if rail transportation is being provided by or under the auspices of a rail carrier.

The Petitioners have advanced 2 arguments in an attempt to support their position that preemption does not apply. First, they contend that the pellet transloading operation is not part of rail transportation, but rather a part of the manufacturing or sale process of the wood pellet producers. Second, the Petitioners argue that transloading activities are not being conducted by or under the auspices of a rail carrier. As demonstrated below, neither of these arguments can withstand scrutiny.

There can be no doubt that transloading, including storage and handling, is a part of transportation by rail. "Transportation" is defined as including any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property by rail" and "services related to that movement, including receipt, delivery. . . storage, handling and interchange . . . ." 49 U.S.C. 10102(9). See, e.g., Green Mountain Railroad Corp. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (the STB has "wide authority over the transloading and storage facilities" of the railroad, which included unloading bulk salt and temporary storage in a shed and unloading bulk cement for storage in silos and eventual transportation by truck). As the court in Green Mountain stated, the railroad "serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the [STB's] exclusive jurisdiction over 'rail transportation'".

A. The Pellet Transloading is an Integral Part of Rail Transportation.

The Petitioners argue that transloading wood pellets from railcars into silos and then into bags for further transporation by truck is not an integral part of rail transportation, but rather is "integrally related to manufacturing or processing for sale." As explained above, producers of wood pellets doing business with G&U have found it more efficient and cost effective to ship from the point of production by rail and transload to truck closer to their markets. Middleton VS at pages 2-3. The alternative would be to bag, palletize and shrink-wrap the pellets where they are produced and transport them by truck or rail boxcar to their markets. This has proven to be more costly, and consequently manufacturers such as Viridis have requested rail carriers, such as G&U, to provide line haul transportation by rail and transloading services closer to the consuming markets. Middleton VS at pages 2-3; Moffett VS at pages 3-4. Rail transportation is most cost effective and efficient in hopper cars, rather than by means of pallets in boxcars, and consequently transloading--moving loose wood pellets from hopper cars into silos and eventually into bags that are placed on pallets for further delivery by truck--is an essential and critical--indeed, integral--part of the rail transportation service.[5]

The fact that transloading and bagging may be of importance to wood pellet producers for purposes of making deliveries to customers does not detract from the obvious conclusion that the transloading of the pellets is an integral part of the transportation service requested by the producers and supplied by G&U. In particular, transloading does not, as alleged by the Petitioners, "change the nature of the pellets".

[5] The transloading of wood pellets by railroads into bags is analogous to the transloading of plastic pellets from rail hopper cars into bags or boxes for further movement by truck. Moffett VS at page 4. G&U is not aware of any challenge to the proposition that such transloading of plastic pellets is not "transportation".

The pellets are exactly the same before and after they are transloaded. Middleton VS at page 3. They are not "processed" or "manufactured" during the transloading. As explained by Mr. Middleton, the manufacturing process, involving the conversion of wood fiber into pellets, is completed at the manufacturing plant. Middleton VS at page 3. The nature and physical composition of the pellets are exactly the same after they are transloaded at the yard as when they leave the manufacturing plant. Contrary to the statement by the Petitioners, the pellets are not "cleaned" or "washed", nor is there any recycling or processing such as "repelletizing" at the Upton yard. Polselli VS at page 4. Dust and small particles are removed and disposed of as waste. Polselli VS at page 4.

Viridis switched to hopper car service provided by G&U after trying to ship bags of pellets in boxcars. The switch was based solely upon considerations of the efficiency and cost of transportation services. Middleton VS at pages 2-3. It was not based upon factors related to the manufacturing or sale of pellets. Try as they might to characterize the transloading and bagging as a part of the manufacturing and sale process, rather than an integral part of rail transportation, the arguments of the Petitioners should be dismissed as mere semantics and misguided sophistry.[6]

The Petitioners' rely on language in the Board's decision in New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (served July 10, 2007) ("New England Transrail"). In that case, the Board considered whether the proposed transloading of construction and demolition

[6] For example, the Petitioners cite a page from the Viridis website that includes 8 paragraphs describing the manufacturing of pellets. The first 7 paragraphs describe the manufacturing process. The final paragraph describes the manufactured pellets as being screened to remove dust prior to bagging. The fact that dust removal and bagging occurs at the Upton yard does not change the fundamental conclusion that the manufacturing is completed at the Viridis facility in British Columbia. Middleton VS at page 3.

debris and municipal solid waste from trucks into railcars would be integrally related to transportation. The Board determined that baling and wrapping of municipal solid waste, including sorting out and returning to the shipper materials that could not be safely transported by rail, were part of the rail transportation services. On the other hand, "shredding"--cutting debris into 2 foot lengths in order to facilitate the extraction of metal, wood and other valuable materials that could be resold--was not integrally related to rail transportation. The Petitioners argue that bagging and palletizing wood pellets are analogous to shredding and are "adding value" as part of the manufacturing process. For the reasons stated below, the reliance by the Petitioners on New England Transrail is misplaced.

As described above, moving the pellets from hopper cars into silos and then into bags and onto pallets are all steps that are integrally related to the transloading, temporary storage and handling functions that are traditionally part of rail transportation. All of these steps are necessary and are performed by a rail carrier prior to transferring the pellets to trucks. Significantly, the transloading process involves no "added value" either to G&U or to the pellet shipper. To the contrary, the dust removal and screening produces only waste material that is of no value for resale, unlike the situation with the construction and demolition debris in New England Transrail. Thus, the bagging aspect of the transloading process for wood pellets is analogous to the baling and wrapping of municipal solid waste, i.e. an integral part of rail transportation.

B. The Transloading Operations are Performed Under the Control of G&U.

The Petitioners argue that preemption does not apply, because the transloading operations at the Upton yard are allegedly not being performed by or under the auspices

of a rail carrier. Rather, discussing various criteria that have been articulated by the Board in its preemption decisions, the Petitioners contend that G&U is not sufficiently in control of the transloading. To the contrary, however, as demonstrated below, the activities of Grafton Upton Railcare are limited and under the control of G&U. The Petitioners' argument is wholly unpersuasive.

The Terminal Transloading Agreement provides a complete answer to the arguments of the Petitioners. As described above, the Agreement governs the relationship between G&U and Grafton Upton Railcare for purposes of transloading at the yard. The operations are explicitly under the direction and control of G&U, which holds itself out as a provider of bulk transloading services as an integral part of its line haul services. Moffett VS at page 1; Petitioners' Exhibits 22, 24 and 25. The role of Grafton Upton Railcare is limited to performing the transloading, billing and collecting for the transloading services on behalf of G&U and receiving compensation for the services.

Significantly, Grafton Upton Railcare is prohibited from conducting any independent business at the yard. Indeed, it may perform transloading services only in conjunction with a rail move on G&U before or after the transloading. Grafton Upton Railcare does not have a lease with respect to any portion of the yard and may use the yard only for the performance of the specific transloading services covered by the Agreement. Gordon VS at pages 2-3; Polselli VS at page 2. No Dana entity is a customer or shipper using the transloading services at the yard. Dana VS at page 4.

The fact that G&U's rail customers have, in some cases, arranged for affiliates of Grafton Upton Railcare to provide trucks does not mean that the role of Grafton Upton

Railcare is not limited to transloading services. As an "open" G&U facility, any qualified motor carrier is entitled to do business at the yard, and there are many other trucking companies--approximately 15--that do so. Polselli VS at page 2; Moffett VS at page 2. Truckers affiliated with Grafton Upton Railcare handle only approximately 25% of the outbound truckloads from the yard. Polselli VS at page 3. Furthermore, the presence of railcars leased by an affiliate of Grafton Upton Railcare does not diminish the fact that Grafton Upton Railcare is simply providing transloading services subject to the direction of G&U. As in the case of the variety of ownership of trucks at the yard, railcars delivering products to the yard are owned or leased by a variety of entities, including rail carriers such as CSX, Canadian National and Canadian Pacific. Polselli VS at page 4.

The Petitioners have reviewed the Board's decisions in Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, STB Finance Docket No. 35057, (served February 1, 2008), and in The City of Alexandria, Virginia-- Petition for Declaratory Order, STB Finance Docket No. 35157, (served February 17, 2009), and have come up with a list of 9 factors to determine whether transportation services, and transloading in particular, have been provided by or under the auspices of a rail carrier.[7] The factors that the Board deemed critical in deciding that preemption applied in the Alexandria case included the fact that the agreement with the subcontractor did not have any characteristics of a lease or license that would indicate that the contractor was conducting an independent business, that the contractor did not pay any fees for the use of the facility, that the term of the contract was limited to 2 years, with the rail carrier having the right to cancel for any reason on 60 days' notice, that the railroad held itself

[7] As the Board is well aware, its decisions on this issue take into account a variety of factors and accord them varying degrees of weight. G&U does not concede that the 9 factors enumerated by the Petitioners represent any definitive set of criteria, but each of the 9 is addressed below.

out as offering transloading service at the yard as part of its common carrier service, and that the agreement did not give the contractor the right to market the facility as its own. All of these factors are present in connection with the arrangement between G&U and Grafton Upton Railcare. Gordon VS at pages 3-4.

As discussed below, evaluation of the questions framed by the Petitioners in this case demonstrates that the transloading at the yard in Upton is rail transportation that is performed under the direction of G&U. The factors are as follows:

1. Whether the transloader is involved in the delivery of railcars from the point of origin to the facility? As "evidence" on this point, the Petitioners allude to an alleged "partnership" between Viridis, the wood pellet customer discussed earlier, and an entity referred to as "Dana Transport Rail Care" (which is not one of the named Dana Companies) as an indication of involvement of Grafton Upton Railcare from the point of origin. As explained above, there is no "partnership" involving Viridis and Grafton Upton Railcare. Even if there were, however, it surely would not be evidence of Grafton Upton Railcare, a transloading contractor, being involved in the delivery of railcars from the point of origin. While, as explained above, a Dana company leases some railcars to Viridis, those cars may be used for shipments anywhere, not only to the G&U yard in Upton. Viridis alone makes the decisions whether to ship its pellets to Upton and what railcars to use. Grafton Upton Railcare has no involvement in that decision-making process. Clearly, the originating rail carrier, any intermediate carriers, including CSX, and G&U are the only parties involved in the delivery of the railcars to the yard in Upton.

2. Whether the transloader is involved in the delivery to the final destination? As in the case of the non-involvement in delivery, Grafton Upton Railcare is not involved in

the further delivery of commodities after they are transloaded into trucks at the yard. The role of Grafton Upton Railcare is limited to transferring commodities from railcars to trucks for further transportation, not providing truck transportation. As noted above, the customers select their own motor carriers, and the use of trucks operated by an affiliate of Grafton Upton Railcare in approximately 25% of the truck trips leaving the yard does not mean that Grafton Upton Railcare is making final delivery.

3. Whether the transloader is offering services to customers directly? In support of its argument on this point, the Petitioners refer to "Dana Trucking" (which is not one of the Dana Companies), Dana Transport, "Dana Leasing" (which is not one of the Dana Companies) and Dana Railcare as allegedly having some interest in activities at the yard. Only if the separate corporate existences and separate business interests of these various companies are ignored and they are all collapsed and considered to be one single entity would this argument even begin to make any sense. As explained by Mr. Dana, these are separate entities engaged in different businesses, including motor carrier services, the provision of equipment and trailers and the lease of railcars, and none of them is involved in the transloading at Upton, which is done by Grafton Upton Railcare alone on behalf of G&U. Dana VS at pages 2-4. The transloading services are offered by G&U as part of its transportation services. As accurately noted by Mr. Dana, "the Upton rail yard is clearly not a Dana Companies facility." Dana VS at page 5.

4. Whether the transloader pays any fees for the use of the facility? The Petitioners speculate--incorrectly--that that rail cars and trucks bearing the names of affiliates of Grafton Upton Railcare are stored at the yard and that it is "probable" that the "Dana Companies are paying a fee for storage." For starters, there is no "storage" of rail

cars or trucks. Rail cars or trucks may be present at the yard on a temporary basis as part of the staging for the transloading operations. For example, there may be empty trucks waiting to be loaded from railcars, or there may be railcars that have not been completely emptied. Moffett VS at page 5. Some of the railcars and trucks in the yard at any given time may be owned by a Dana company, but for purposes of staging for transloading all railcars and all trucks, regardless of ownership, are treated in the same fashion by G&U. Significantly, G&U does not charge Grafton Upton Railcare, or any affiliates of Grafton Upton Railcare, to use the yard. Polselli VS at page 3. Rather, Grafton Upton Railcare is compensated by G&U for the transloading services. Dana VS at page 6.

5. Whether the transloader has separate contractual relationships with customers for other arrangements at the facility? The activities and responsibilities of Grafton Upton Railcare are explicitly defined and limited by the Terminal Transloading Agreement, and these activities and responsibilities do not include the right to have contractual relationships "for other arrangements" at the yard. As noted above, Grafton Upton Railcare is expressly prohibited from carrying on any independent or separate business at the yard. Grafton Upton Railcare has complied with this provision of the Terminal Transloading Agreement. Dana VS at page 6.

6. Whether the marketing of the facility involves the transloader? G&U has marketed its transloading services as an integral part of its overall transportation services. Moffett VS at pages 1-2. G&U has also promoted the fact that the transloading is being performed by Grafton Upton Railcare, an affiliate of a group of companies having great experience and expertise in bulk transportation and transloading. Grafton Upton Railcare does no independent marketing of its transload services. Dana VS at page 5. Does

G&U's marketing "involve" Grafton Upton Railcare? Certainly it does, because it demonstrates that customers of G&U can expect efficient and high-quality service from G&U's contractor in the transloading operations. Clearly, however, any such marketing does not mean that the transloading is not being done under the control and auspices of G&U.

7. Whether the transloader has any contractual relationships relating to the facility with any of the shippers? Grafton Upton Railcare has no contractual relationships with any customers or shippers that use the G&U transloading yard in Upton. Dana VS at page 4. A Dana controlled company, International Equipment Leasing, Inc., has leased 6 railcars to Viridis. Viridis has used these cars to transport pellets from British Columbia to Upton, but Viridis is also free under the terms of the lease to use the cars anywhere that it sees fit. Middleton VS at page 3.

8. Whether the transloader set [sic], invoices for or collects transloading fees charged to the shipper? The maximum transloading fees are established by G&U in its tariff and in accordance with its Tariff 5000. Moffett VS at page 6; Polselli VS at page 3. The fees are invoiced and collected by Grafton Upton Railcare as the agent for G&U.[8] Like most rail carriers in today's deregulated market, however, G&U is often asked by customers to negotiate lower rates. For purposes of transloading charges at the yard, G&U has given Grafton Upton Railcare some flexibility to charge rates that are lower than the tariff. Requests for discounts are discussed between G&U and Grafton Upton

[8] As an interline connection of CSX, G&U does not invoice or collect from line haul customers directly. Rather, CSX does the billing and collecting for itself and G&U and remits G&U's portion of the line haul revenue. For this reason, G&U found it more convenient to have Grafton Upton Railcare bill for the transloading services as the agent of G&U. Moffett VS at page 6.

Railcare and final decisions are made by G&U whether to accommodate the request. Moffett VS at page 6; Polselli VS at page 3.

9. Whether the railroad assumes liability or responsibility for transloading activities? The Petitioners argue that G&U's Service Terms and Conditions for its bulk transfer facilities purport to limit G&U's liability for loss or damage to that of a "warehouseman".[9] The recitation of terms and conditions attempting to limit G&U's responsibility for loss and damage is typical of railroad tariffs, and such attempts may or may not be effective. Suffice it to say that G&U expects to be responsible for loss and damage claims as a common carrier in accordance with 49 U.S.C. 11706 and the many decisions construing that statutory provision. Moffett VS at page 6.

In summary, Grafton Upton Railcare is not conducting an independent business at the yard. Rather, evaluation of the criteria cited by the Petitioners demonstrates that Grafton Upton Railcare it is performing limited and specified transloading functions on behalf of and under the direction of G&U. The transloading is being performed under the auspices of G&U, and there is no basis to conclude, as the Petitioners argue, that preemption should not apply.

CONCLUSION

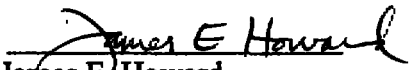
Based upon the Petition and this Reply by G&U, the Board has a sufficient basis to determine either that the Petition should be dismissed or that state and local regulation of the G&U yard in Upton is preempted. There is no basis for or reason to institute a declaratory order proceeding.

[9] These Service Terms and Conditions were made effective in 2010 but were abolished approximately 4 months ago and are no longer in effect. Moffett VS at pages 5-6.

The Petitioners have suggested that they will "supplement" their petition after they have "the benefit of discovery".[10] As noted above, G&U believes that there is no reason to institute a declaratory order proceeding. In the event that the Board disagrees and decides that the record should be supplemented or that a declaratory order proceeding should be instituted, G&U respectfully requests that the Board afford G&U an opportunity to conduct its own discovery and set an appropriate schedule for supplementing the record.

Respectfully submitted,

GRAFTON & UPTON
RAILROAD CO.



James E. Howard
70 Rancho Road
Carmel Valley, CA 93924
831-659-4112

Dated: August 20, 2012

[10] The Petitioners have agreed to defer any discovery, including the request for the production of documents that was included in the Petition, until such time as the Board either institutes a declaratory order proceeding or sets a schedule for discovery.

Certificate of Service

I hereby certify that I have served the foregoing Reply and the accompanying Verified Statements as of this 20th day of August, 2012 by causing a copy to be sent by Federal Express to Mark Bobrowski, Blatman, Bobrowski & Mead, LLC, 9 Damonmill Square, Suite 4A4, Concord, Massachusetts 01742.

James E Howard

James E. Howard

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
JON DELLI PRISCOLI

1. My name is Jon Delli Priscoli, and I am the owner and chief executive officer of Grafton & Upton Railroad Co. ("G&U"). I am familiar with the petition for a declaratory order filed in the proceedings captioned above, and I am familiar with the business operations of G&U.

2. G&U was formed in 1873, and it has been in continuous operation since then. The line of G&U extends a total of 16.5 miles between a connection at North Grafton, Massachusetts with the CSX main line through Massachusetts to a connection with another line of CSX in Milford, Massachusetts.

2. My professional background includes substantial railroad experience. From 1990 to 2001, I operated the Quincy Terminal Railroad, which is located in Quincy, Massachusetts, pursuant to a lease from the Massachusetts Water Resources Authority. I also own the Edaville Railroad, which is a tourist passenger operation located in Carver, Massachusetts. I am also the owner of First Colony Development Co., which has concentrated its activities in real estate development projects over the last 32 years.

3. I acquired all of the outstanding stock of G&U in 2008. I thought that G&U presented an opportunity to provide rail service in an area that had been underserved by rail or served only by trucks for many years. In 2008, only the 7 mile stretch of the G&U line between North Grafton and Upton was being used, and it required substantial rehabilitation. In Upton, G&U had a small transloading yard that had been used for many years for transloading various commodities, including salt and coal. The salt operation included both bagging and bulk distribution. The first capital project that I undertook, entirely with G&U funds, was to completely rehabilitate the first 7 miles by installing new ties and replacing substantial amounts of rail and surfacing the entire line. I recognized that it would be necessary to undertake this track work in order to persuade rail customers to interchange with G&U at North Grafton.

4. In 2009, I learned that there was a 33 acre parcel of real estate immediately adjacent to the existing G&U rail yard in Upton, owned by Upton Development Group, LLC . I envisioned expanding the existing rail yard to create a much larger transloading facility where commodities could be transferred primarily from rail to truck but also from truck to rail. Upton Development Group, of which I became a 1/3rd partner, entered into a 20 year lease with G&U that gives G&U the absolute discretion to use and develop the yard for any purposes, including rail transportation purposes. The lease also affords G&U the option to purchase the property.

5. After G&U obtained control of the new yard property, I began planning the expansion. We contemplated additional tracks that would enable trucks to drive up next to the railcars in order to unload a variety of commodities from the railcars, including food grade materials, chemicals and petroleum products. We also planned the

construction of a facility that could be used to transfer wood pellets from railcars to trucks. As these plans were being developed, I opened up and expanded over time a candid and forthcoming dialogue with officials of the town of Upton. I advised the town manager, the Board of Selectmen, the Board of Health, and the police and fire departments of the nature of the plans. I invited them to review the plans and to visit the yard.

6. I also told the town officials that as a result of the federal preemption provisions relating to railroads, it was the belief of G&U that the town did not have the right to approve or preclear the expansion or operation of the yard. Based on my own experience and advice from counsel, I understood that even though, for example, the town planning board did not have the right to review and approve the plans, G&U would nonetheless have to comply with reasonable provisions of the various town health and safety regulations that would otherwise be applicable. Consequently, the construction and operation of the yard have been open to inspection by all of the town officials, and we have been assured that the construction of the facilities meets all of the building codes, including electrical and plumbing, designed for the protection of the health and safety of the citizens of Upton.

7. The officials of Upton have, with only a few exceptions, been satisfied with the activities of G&U at the yard and have concluded that federal preemption in fact applies. In 2009, when several town residents and certain members of the planning Board raised the question whether preemption applied, the Board of Selectmen retained counsel who had expertise in rail preemption issues. In conversations with members of the Board of Selectmen and the town manager, I was informed that, based on an

extensive report from counsel and further review, the Board of Selectmen came to the conclusion that preemption applied and that they should take no action to attempt to enforce town zoning or land use regulations. In order to cooperate with this review, G&U agreed to reimburse the town for its legal expenses.

8. G&U has always tried to be a good neighbor and corporate citizen in all of its dealings. Although not required to do so, we have constructed berms and planted trees in order to insulate the yard from neighbors' houses located on streets that bordered the yard. Ms. Del Grosso, one of the petitioners in this case, sent me an e-mail thanking me for doing so. A copy of the e-mail is attached as Exhibit A. We have also fenced the yard.

9. As of this time, G&U has constructed 4 unloading tracks in the yard, totaling approximately 2000 feet in length. We have also completed, as of approximately a year ago, construction of the wood pellet transloading facility. G&U is slowly but surely developing and expanding the volume of transload business that is being done at the yard in Upton. We have advertised and promoted our transportation services to include transloading as an integral part of the overall service.

10. I realized as we were developing the plans for the yard that as a small organization G&U did not have sufficient personnel or, more importantly, the expertise and experience required to operate a transloading yard that would handle everything from chemicals to wood pellets. I entered into discussions with Ronald Dana, who is the owner of a number of companies that are involved in the transportation business, concentrating primarily in the transportation of bulk commodities and the transfer of bulk commodities between trucks or between trucks and railcars. As a result of these

discussions, G&U entered into a Terminal Transloading Agreement dated December 30, 2010, with Grafton Upton Railcare, LLC, a newly created entity owned by Mr. Dana. The terms and conditions and negotiations relating to the Agreement are described in the accompanying Verified Statement of Stanley Gordon, but the underlying theory of the arrangement that was created pursuant to the Agreement was to have G&U performing transloading services by having Grafton Upton Railcare working as a subcontractor under the direction and auspices of G&U. In other words, in structuring the relationship, we were acutely aware of, and tried to comply with, the requirements of preemption as articulated by the Board and the courts.

11. As noted above, the transloading business at the yard has grown over the last several years. As it has grown, the operations have been carefully scrutinized and inspected by the Federal Railroad Administration ("FRA"). The FRA inspectors have advised me that the Upton yard has been inspected far more frequently than other similar yards of other railroads as a result of "complaints" by abutters who purchased their homes directly next to the G&U line. The FRA has found that the transloading operations are being conducted safely and in accordance with applicable regulations.

12. We also continue to work carefully and closely with the fire department of the town of Upton. In particular, we have put in place, based on consultation with the fire department, various plans to prevent releases of hazardous materials or, in the unlikely event of a release, to be able to respond quickly. The fire department has been fully supportive of our efforts. We have purchased and donated two foam fire fighting trailers to the fire department to be available for any safety event anywhere, whether rail related or not.

13. Even though G&U believes that it has done everything necessary or appropriate, there have continued to be requests from various citizens of the town to the Board of Selectmen and from certain members of the Planning Board to ask the Surface Transportation Board whether the activities of G&U at the yard are preempted. As a result of these requests, the Board of Selectmen created a railroad fact-finding committee approximately one year ago. The committee was originally comprised of 5 members, one of whom was Diana Del Grosso, one of the Petitioners. The committee spent many hours gathering information, some of which was provided by G&U in response to questions of the committee, concerning preemption and G&U's activities. The committee issued its report in June, 2012 without any definitive recommendation whether to request a decision from the STB or not. On August 7, 2012, however, the Board of Selectmen reaffirmed its earlier decision that preemption applied and concluded that the town would take no action in order to pursue the issue at the STB or anywhere else for that matter. A transcript of the portion of the meeting during which the Board of Selectmen discussed this issue is attached as Exhibit B. The decision of the Board of Selectmen was supported by a letter from town counsel dated July 13, 2012, which is attached as Exhibit C.

14. One of the petitioners in this case, Ms. Del Grosso, was originally a member of the railroad fact-finding committee, but she resigned without explanation prior to the issuance of the report by the committee. Another petitioner, Ray Smith, is a member of the Upton Planning Board, which, as noted above, was the only town agency that questioned the applicability of preemption. Joseph and Cheryl Hatch, two of the petitioners, are rental tenants, not owners of the property.

15. As described, G&U has attempted, and I think succeeded, in taking every appropriate step to have its activities come within the preemption principles and, in addition, has complied with the substance of all of the regulations and ordinances of the town. In addition, G&U has operated in a manner that has met all of the requirements of the FRA and all of the safety requirements of the Upton Board of Health and fire department. Based upon my conversations over the last several years and in particular the last month or so with town officials, including members of the Board of Selectman, the town manager, the fire chief and the chairman of the Board of Health, I believe that the governing officials of the town agree that G&U has been operating in a safe and responsible manner. In fact, at the meeting of the Board of Selectmen on August 7, 2012, Chairman Picard stated on the record that "you've been a very good partner, Jon." Exhibit B attached hereto at page 7.

16. The expansion of the rail yard, the overall rehabilitation of the rail line and the transloading business has created 67 jobs that would otherwise not have existed. In addition, there is new economic activity in Upton that has undoubtedly generated other jobs for residents and opportunities for other businesses in town, including increases in the Town's commercial tax base. In short, the expansion and transloading activity at the yard has been beneficial for the town of Upton and its citizens.

VERIFICATION

Commonwealth of Massachusetts

ss:

County of Middlesex

I, Jon Delli Priscoli, being duly sworn, depose and state that I am Chief Executive Officer of Grafton & Upton Railroad Company ("G&U"), that I am authorized to sign the foregoing Verified Statement on behalf of G&U, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

Jon Delli Priscoli

Subscribed and sworn to
before me this 16 day of
August, 2012

Notary Public

BARBARA A. MAURICE
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
April 07, 2017

James E. Howard

From: Jon Delli Priscoli [JonDelli@firstcolonydev.com]
Sent: Monday, June 01, 2009 10:10 AM
To: James Howard
Subject: FW: Thank you from Depot St.

fyi

From: Diana DelGrosso [mailto:ddelgrosso@charter.net]
Sent: Saturday, May 30, 2009 10:40 AM
To: Jon Delli Priscoli
Subject: Thank you from Depot St.

Good morning Mr. Delli Priscoli,

The residents of Depot St. have been commenting on the protective berm that is being constructed on the Upton site. We all agree that it has exceeded our expectations and want to thank you for going above and beyond what is required. We also appreciate the watering trucks that have been doing such a good and thorough job. All of us wanted to send you a "thank you" and note of gratitude. We want to be good neighbors to you as well as you being one to us.

Sincerely,

Depot Street Residents

COMMONWEALTH OF MASSACHUSETTS

BOARD OF SELECTMEN MEETING

RAILROAD FACT-FINDING COMMITTEE

6:00 P.M.

Tuesday, August 7th, 2012

BEFORE: THE BOARD OF SELECTMEN

APPEARANCES:

BOARD MEMBERS:

KENNETH PICARD, CHAIRMAN
ROBERT FLEMING
JAMES BROCHU

BLYTHE C. ROBINSON
TOWN MANAGER, TOWN OF UPTON

MS. SANDRA HAKALA, DEPARTMENT COORDINATOR

JON DELLI PRISCOLI
FIRST COLONY GROUP

Upton Fire Department
20 Church Street, 2nd Floor
Upton, Massachusetts

Teresa P. Wood
Registered Professional Reporter

PROCEEDINGS

MR. CHAIRMAN: We're going to open the meeting. We have a discussion item regarding the Railroad Fact-Finding Committee. We have a discussion with the fire chief about a draft emergency preparedness plan.

Next item is a response to the Railroad Fact-Finding Committee. We had discussion last week, Jim, when you were unavailable, and we held off on making any determination or action, or anything that we were going to do. So I'll kind of open it up for you to make your comments, and then we'll decide what we're going to do.

MR. BROCHU: Again, I think the Fact-Finding Committee came and made their presentation and, you know, it was a good presentation.

Kopelman & Paige basically answered the questions that they had with I think answers that we were already aware of. So, again, I don't know of any further action needing to be done here.

MR. CHAIRMAN: Bob?

MR. FLEMING: I concur. We've had multiple reviews by counsel, not only our counsel, but obviously the federal agencies as well, and they're all consistent. So I see no need to pursue this any further.

MR. CHAIRMAN: Blythe, do you have anything you want to add to it?

MS. ROBINSON: On a slightly related point, you're aware, I believe, that since we've talked about this last time, there were seven petitioners that did file an action through an attorney to the STB.

I asked our attorney to review that, and to let us know if he felt there was any action the Town needed to take, and the answer that he provided was no, there is not; the Town is not a party to it, so there is no appropriate action for us to take at this time. So I just wanted to make sure that you were aware of that.

MR. CHAIRMAN: Thank you.

I think based on the information we've received, and since it's my understanding from the other Board members that we are not planning

to take any action with any legal recourse, or whatever, with the STB or federal court at this point, that we do not need a motion to do anything since we're not going to be doing anything.

I think it's clear that, at least on my part, from our own town counsel, that this is I think a pretty clear-cut item for us; its been said repeatedly that it is a pre-exemptive process over there, and so I think it be only prudent for us to stay where we are and not act until we have more information or something changes. So I think the prudent thing is not to take any action at all.

MR. FLEMING: Mr. Chairman, my only comment would be that, to clarify, that this was a request of the minority report of the committee, and that I do not concur with the minority report's decision to go forward. So I just wanted that on the record.

MR. PRISCOLI: Mr. Chairman, I don't know if I can speak --

MR. CHAIRMAN: Yes, Jon.

MR. PRISCOLI: You said pre-exited or

something; it's actually preempted.

MR. CHAIRMAN: Preempted, I'm sorry.

And just a point of clarification, at the last meeting I think we had discussed that you were waiting for Mr. Brochu, obviously he had family, or some other arrangement, and you wanted to do that, and I mean I understand there's no action necessary, but is it possible for the Board just to vote that there's no action necessary?

MR. CHAIRMAN: I don't think we need to make a motion to do anything, Jon, since we're not going to be doing anything; I think the only time we need to make a motion is when we're going to follow through with something. I can poll the Board members.

Bob, do you want to take any action? Do you want to do anything?

MR. FLEMING: No action. I don't have a problem with making a motion to take no action.

MR. PRISCOLL: I just want to make it clear.

MR. BROCHU: I have no problem with that.

MR. FLEMING: I'll make a motion that the Board, make a motion for the Board of Selectmen to take no action as a result of the town counsel's report relative to the minority report request of the Railroad Fact-Finding Committee.

MR. BROCHU: I will second that.

MR. CHAIRMAN: That is a unanimous motion of the Board.

MR. PRISCOLI: Thank you, Mr. Chairman, for letting me speak.

MR. CHAIRMAN: You're welcome.

MR. BROCHU: Mr. Chairman, if I may, with respect to the Railroad Fact-Finding Committee is that being dissolved --

MR. CHAIRMAN: We dissolved that already at one of the previous meetings. Their charter was strictly to answer some questions; they performed that I think very well.

MR. PRISCOLI: Just one final thing, you had mentioned last week that you'd like us to come in and update, and I just wanted to know what the Board's position is on that, and what date you would like me to do that.

MR. CHAIRMAN: I think, Jon, we'll schedule that in September.

MR. PRISCOLL: Okay. So I'll just work with Blythe. There's things that I'm working on with the fire chief and others, and it's all good material, and I would like to share that with the Board and the public at large, and also answer any other questions, and be available for questions.

MR. CHAIRMAN: I think we'll leave that until September, Jon.

MR. PRISCOLL: I just wanted to make sure you knew I was available.

MR. CHAIRMAN: We're going to, I don't want to say clean our slate, but we're going to make sure there's nothing on it.

MR. PRISCOLL: I just wanted to make sure you knew we were available to answer that, and whatever you want that agenda to be, I'm happy to respond.

MR. CHAIRMAN: You've been a very good partner, Jon.

MR. PRISCOLL: So has the town.

MR. CHAIRMAN: The next item now for us

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July 13, 2012

Mark R. Reich
mreich@k-plaw.com

BY FACSIMILE (508) 529-1010

Ms. Blythe C. Robinson
Town Manager
Upton Town Hall
1 Main Street, Box 1
Upton, MA 01568

Re: Railroad Fact Finding Committee – Questions to Town Counsel

Dear Ms. Robinson:

You have provided me with a copy of a memorandum dated May 4, 2012 from Gary Boham containing four questions from the Town's Railroad Fact Finding Committee relative to the draft report submitted by the Committee to the Board of Selectmen. In addition, you have provided a copy of a letter from the Planning Board to you dated May 8, 2012 with one question regarding the report. Each of these questions is directed to Town Counsel and relates to the potential filing of a petition with the Surface Transportation Board (the "STB") and related litigation costs. I will list the questions below followed by brief answers as requested.

1. In light of the information provided in the DRAFT report, is it the opinion of Town Counsel that the activities at the Facility are preempted from local regulations?

The Committee's draft report contains two conflicting viewpoints on this matter as well as a number of documents summarizing caselaw and information developed or obtained by the Committee. Town Counsel previously discussed the issue of preemption in its January 19, 2012 letter, giving consideration to the transportation and handling activities at the Grafton-Upton Railroad ("GURR") Maple Avenue site. The determination of whether the activities at the site are preempted from local regulation is, of course, beyond the scope of Town Counsel's authority. It is important to note the broad intent under the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA") with respect to consideration of transportation by rail. "The statutory language [of the ICCTA] indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation." Grafton and Upton Railroad Co. v. Town of Milford, 337 F.Supp.2d 233, 238 (D. Mass. 2004). As previously stated, in my opinion, the transportation and handling of wood pellets at the Maple Avenue facility by the GURR as described in the Committee documents are consistent with those activities deemed by the STB to be exempt from local regulation under the ICCTA.

KOPELMAN AND PAIGE, P.C.

2. If the Town were to go to the STB or Federal court and it was determined that the Facility was preempted from local regulations, is it Town Counsel's understanding that the STB or Federal court would thus require the Town to reimburse the railroad for its associated incurred legal costs?

The STB serves as an adjudicatory and a regulatory body with jurisdiction over rate and service matters and has exclusive jurisdiction over matters involving transportation by rail carriers. Actions taken by the STB in rendering decisions on petitions, such as consideration of questions of preemption as contemplated herein, are not "adversary adjudications" as defined in federal regulations and so would not trigger the award of attorney's fees to the prevailing party. An action brought in federal court may result in the award of attorney's fees to the prevailing party if the action is frivolous or if the statutory framework under which the action is brought specifically provides for the awarding of attorney's fees. Generally, however, an appeal from an adjudicatory decision would not warrant the awarding of attorney's fees unless such appeal is deemed frivolous.

3. If the Town were to go to the STB or Federal court and as result, the railroad filed suit against the Town, is it Town Counsel's opinion that the Town would have a reasonable basis to challenge the railroad lawsuit as a "Strategic Lawsuit Against Public Participation" (SLAPP) as provided for in M.G.L. c. 231, § 59H? If it was determined that such a railroad lawsuit was a SLAPP, would the railroad be required to reimburse the Town for the Town's associated incurred legal costs?

While it is not clear at this juncture what cause of action the GURR would pursue against the Town, it is my opinion that the Town would not have a high likelihood of success on a special motion to dismiss pursuant to G.L. c. 231, s. 59H, the Anti-SLAPP statute.

Pursuant to the provisions of G.L. c. 231, § 59H, a party may seek dismissal of any civil matter "based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth." A request for review by a federal agency with subject matter jurisdiction over a matter, such as the STB, in my opinion would qualify as "petitioning activity" within the meaning of the statute. See, e.g. United States v. Sweeney, 226 F.3d 43, 46 (1st Cir. 2000) (communications with the FDIC constitute petitioning activity), and Massachusetts Courts have applied this statute to allow dismissal of a wide variety of claims, including claims sounding in tort, breach of contract and declaratory judgment. See North American Expositions Co., LLC v. Corcoran, 452 Mass. 852 (2009). Once a court grants a special motion to dismiss pursuant to the Anti-SLAPP statute, an award of attorneys' fees is mandatory. Id.

In this matter, although the Town's complaint to the STB would likely be considered petitioning activity, in my opinion, the Town would have to clear a number of hurdles to succeed on a special motion. First, any suit filed by the GURR would likely be brought in federal court, where the Anti-SLAPP statute does not apply. The Saint Consulting Group, Inc. v. Litz, 2010 WL

2836792 (D.Mass. 2010) (although the issue has not been addressed by the First Circuit Court of Appeals, at least four Justices of the Massachusetts District Court have held that the Anti-Slapp statute does not apply to suits filed in Federal Court). In addition to the inapplicability of the statute in Federal Court, a court may find that the Town as an entity would not be considered a party subject to protection by the Anti-SLAPP statute. South Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F.Supp.2d 85, 112-113 (D.Mass. 2010) (First Amendment does not protect petitioning activity of government officials acting in their official capacities).

If the Town can overcome these jurisdictional hurdles, it would have to show that the suit brought by the GURR is based on the Town's petitioning activity alone and has no substantial basis other than or in addition to its petitioning activities. Office One, Inc. v. Lopez, 437 Mass. 113 (2002). Given the issues being raised, it is unlikely that the GURR would bring an action based solely on the Town's petitioning activity. If the Town is able to make this threshold showing, the GURR will have the burden of proving that the Town's petitioning activity is devoid of any reasonable factual support or any arguable basis in law, and that the activity caused the GURR actual harm. Id. In my opinion, the Town's likelihood of success in this regard would be largely dependent upon the outcome of the proceedings before the STB.

4. If the Town were to go to the STB or Federal Court and as result, the railroad filed suit against the Town in an attempt to recover railroad attorney fees and other associated costs to be paid for by the Town, is it Town Counsel's opinion that the Town would be vulnerable to a court awarding the railroad such a claim as provided for under 42 U.S.C. §§ 1983 and 1988 (as initially occurred in the Town of Ayer railroad litigation that has been previously referenced by the Board)?

I believe this question is generally answered in the response to Question 2 with respect to an award of attorney's fees. If the Town were to proceed with an action at the STB or in federal court, it is likely that the GURR would defend against such action, and the GURR may request an award of attorney's fees in federal court if the Town's claims were frivolous or if there was some other statutory basis for making such a request. The award of attorney's fees by the Court in Boston and Maine Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003) arose under the specific authority to seek attorney's fees for civil rights claims under the provisions of 42 U.S.C. §§ 1983 and 1988. The assertion of such a claim by the GURR for civil rights damages would likely include a request for attorney's fees.

The question raised by the Planning Board is, "Given that a lawsuit is typically defined as a proceeding in a court of law, would petitioning the Surface Transportation Board (an economic regulatory agency) for a Declaratory Order be considered a lawsuit?"

A lawsuit is defined in Black's Law Dictionary as, "a suit, action, or cause instituted or depending between two private persons in the court of law. A suit at law or in equity; an action or

proceeding in a civil court; a process in law instated by one party to compel another to do him justice." As noted above, the STB is both an adjudicatory and a regulatory body and has exclusive jurisdiction over petitions on matters involving transportation by rail carriers. Since the rights of parties are adjudicated by the STB, in my opinion actions before the STB sitting as an adjudicatory body are akin to lawsuits.

Please contact me with any further questions you may have regarding this matter.

Very truly yours,

Mark R. Reich

MRR/man
454367/UPTO/0050

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
STANLEY GORDON

1. My name is Stanley Gordon, and I am Vice President of Grafton & Upton Railroad Co. ("G&U"). I am also the Chief Operating Officer of First Colony Development Co. Inc., a real estate development company that is owned by Jon Delli Priscoli. In addition, since 1984, I have worked with Mr. Delli Priscoli in connection with other business ventures in which he is involved, and I have primary internal responsibility for all contract negotiations.

2. I am familiar with G&U, its legal relationships and contracts and its operations generally. I have reviewed the Petition filed in the above-captioned proceedings.

3. On behalf of Mr. Delli Priscoli and G&U, I was involved in negotiating and documenting a transaction in 2008 with the Upton Development Group, LLC ("UDG") concerning approximately 33 acres of real estate at 25 Maple Avenue in Upton (the "Maple Avenue Land"), which is adjacent to the G&U line and existing rail yard.

4. A majority of the Maple Avenue Land was formerly a landfill that was operated and controlled by the town of Upton. The Massachusetts Department of

Environmental Protection ("DEP") has required that this property be remediated in accordance with a Tier I Permit from the Massachusetts Department of Environmental Protection under the Massachusetts Contingency Plan, and UDG is in the process of completing the remediation. Thus far, UDG has advised me that it has expended approximately $1.5 million correcting the environmental problems created by the town's landfill and that, if the cleanup had been undertaken by the Town of Upton under the public bid process, the cleanup costs would have exceeded $4 million. The cleanup effort is expected to be completed in 2013.

5. In 2008, G&U and Mr. Delli Priscoli approached UDG to purchase the Maple Avenue Property after the citizens of the Town of Upton voted at a Special Town Meeting on March 10, 2008 not to purchase the Maple Avenue Land from UDG. Mr. Delli Priscoli became a partner in UDG and the entire parcel was leased to G&U with an option to purchase all of the land (the "Lease"). The Lease provides that G&U may use the property for rail purposes and may construct rail facilities. Lease at pages 10-11. There are no restrictions in the Lease regarding these uses or facilities. The Lease has an initial term of 20 years. Lease at page 1. G&U has not yet closed on its purchase option (Lease at page 10 and amendments to Lease), because the remediation work required by the Massaschusetts DEP has not been fully completed. A copy of the Lease, including 2 amendments to the lease, is being submitted to the Board under seal.

6. I was involved in the negotiation and drafting of the Terminal Transloading Agreement dated December 30, 2010 between G&U and Grafton Upton Railcare (the "Agreement" or the "Terminal Transloading Agreement"). The Agreement was modeled on a transloading agreement between Norfolk Southern Railroad and its transloading

contractor at a propane transfer facility located in Alexandria, Virginia. We knew that the Surface Transportation Board had reviewed the Norfolk Southern agreement and had determined that the arrangement created by that agreement was the basis for the preemption of local regulations that Alexandria was attempting to enforce against the transloading operations at the Norfolk Southern facility.

7. The Terminal Transloading Agreement is a confidential contract between G&U and Grafton Upton Railcare, but the parties agreed to provide a summary of the Agreement to the town of Upton, at its request, in order to enable the town to continue its review of the applicability of preemption to the G&U transportation activities at the Upton yard. As summarized in a letter from counsel for G&U to the town's special counsel for preemption issues dated August 18, 2011, which is Exhibit 6 submitted by the Petitioners in this case, the Agreement provides as follows:

(a) Grafton Upton Railcare agreed to provide transloading services "for and under the auspices and control" of G&U at the G&U rail yard. Agreement at page 1.

(b) The Agreement applies to any commodities handled by rail to or from the yard in the sole discretion of G&U. Agreement at page 2.

(c) Grafton Upton Railcare is required to perform all the necessary transloading services, including providing equipment and employees necessary for the transloading and, if necessary, arranging for motor carriers to complete the transportation of commodities brought into the yard by rail. Agreement at pages 2-4. Grafton Upton Railcare arranges truck service only if customers request assistance, but in practice I understand that the customers have been making trucking arrangements themselves.

(d) Grafton Upton Railcare bills and collects from G&U's customers, in accordance with G&U's tariff, for the transloading services on behalf of G&U, and G&U compensates Grafton Upton Railcare for the transloading services. Agreement at page 8.

(e) Grafton Upton Railcare is expressly prohibited from using the yard for purposes of any activities other than transloading for G&U customers. The prohibition explicitly includes conducting any independent business for Grafton Upton Railcare's own account. Agreement at page 5.

(f) Grafton Upton Railcare may deal only with rail customers of G&U, which means that there must be a rail movement on G&U prior or subsequent to transloading services being performed at the yard. Agreement at page 5.

(g) The Agreement has a 2 year term, but G&U has the right to terminate the Agreement for any reason on 60 days' notice. Agreement at page 12.

(h) G&U may use the entire yard at any time for any purpose in its sole discretion so long as it does not unreasonably interfere with the transloading activities. Agreement at pages 12-13. Contrary to the statement attributed to Warren Flatau of the Federal Railroad Administration (at paragraph 29, pages 8 and 9 of the Petition), G&U has not leased any part of the Upton yard to Grafton Upton Railcare or any other Dana related entity. A copy of the Terminal Transloading Agreement is being filed with the Board under seal.

8. In her affidavit (at page 5 of Volume 2 submitted by the Petitioners), Diana Del Grosso, one of the Petitioners, has listed the individual Petitioners as either owners or tenants of certain properties located in the vicinity of the yard. Based upon a review of public records of the property tax assessor, certain of the claims of Ms. Del Grosso are

not accurate. For example, Richard Kosiba is not the legal owner of 6 Railroad Avenue. Rather, the property is owned by Richard H. Kosiba as trustee of the Richard H. Kosiba Family Trust for the benefit of unnamed beneficiaries. Similarly, Ray Smith is listed as the owner of 9 Railroad Avenue, but the records show that the property is owned by Raymond P. Smith, Trustee under the Raymond P. Smith Living Trust. Ray Smith is also a member of the Planning Board of the town of Upton, and he has consistently recused himself from any actions by the Planning Board relating to G&U or the yard (see page 128 of Volume 2 submitted by the Petitioners), apparently recognizing the conflict created by the location of his residence.

VERIFICATION

Commonwealth of Massachusetts

ss:

County of Middlesex

I, Stanley Gordon, being duly sworn, depose and state that I am Vice President of Grafton & Upton Railroad Company ("G&U"), that I am authorized to sign the foregoing Verified Statement on behalf of G&U, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

Stanley Gordon

Subscribed and sworn to
before me this 16 day of
August, 2012

Notary Public

BARBARA A. MAURICE
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
April 07, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
ERIC MOFFETT

1. My name is Eric Moffett, and I am the President of Grafton & Upton Railroad Co. ("G&U"). A major part of my responsibilities includes marketing the transportation services of G&U. In particular, I have spent a considerable amount of time over the last few years trying to develop new rail business for G&U at its expanded transloading yard in Upton, Massachusetts. I am familiar with the transloading business that G&U currently conducts at the Upton yard and with the relationships with our transloading customers and our transloading subcontractor, Grafton Upton Railcare. I have also reviewed the Petition filed by certain residents of the town of Upton in the above-captioned proceeding.

2. G&U has always held itself out to the public as having the ability to perform transloading services at the yard in Upton as part of its overall transportation services. The G&U website makes it clear that we are able to provide transloading, and this is confirmed by the G&U promotional document submitted by the Petitioners as their

Exhibit 22 and the G&U Service Terms and Conditions (which are no longer in effect, as explained below) filed by the Petitioners as Exhibit 25. The Upton yard is an "open terminal", which means that any customer has the ability to ship railcars to the yard and have them transloaded into trucks or bring commodities to the yard by truck and have them transloaded into railcars. G&U also permits customers to do their own transloading at the Upton yard. For example, one customer brings liquid products by tank truck to the yard and performs the transloading into railcars with its own personnel.

3. In promotional material published by G&U, we have noted that we have a relationship with companies owned by Ronald Dana in order to be available to provide truck service in connection with G&U's transportation of bulk commodities. The Dana trucking companies have substantial experience and expertise in the area of handling bulk commodities, and we believed that it would be a strong selling point to G&U's customers to be able to assure them that the transportation of their products could continue beyond the Upton yard with responsible truckers. As an open facility, however, there are many different trucking companies that pick up loads at the yard. The choice of which trucker to use is made exclusively by our customers. In fact, I estimate that Dana trucks handle only approximately 25 percent of the loads leaving the yard by truck. Approximately 15 other trucking companies do the other 75% of the trucking business at the Upton yard.

4. I am familiar with the Terminal Transloading Agreement dated December 30, 2010 between G&U and Grafton Upton Railcare, which is owned by Mr. Dana. I am the person who is primarily responsible for the day-to-day working relationship with Grafton Upton Railcare for purposes of providing transloading, through the subcontract

arrangement with Grafton Upton Railcare, as part of the transportation services offered by G&U to its customers.

5. I am also familiar with the transloading of wood pellets at the Upton yard. G&U is, to my knowledge, the first railroad to provide the capability to customers for the transloading of wood pellets. As explained below, providing this service was a response to the desires of wood pellet manufacturers and customers that are receivers of wood pellets to have a more efficient and less costly means of transporting pellets after the completion of the manufacturing process at the manufacturers' facilities.

6. Within the United States, the New England area is by far the largest consumer of wood pellets. Wood pellets are also shipped to Europe. Many of the manufacturing facilities for wood pellets are located in Canada or the Pacific Northwest, so transportation is a significant factor, in terms of the cost to deliver their products to their markets, for the wood pellet manufacturers. The ultimate consumers of wood pellets tend to be individuals or distributors, such as Home Depot, that then sell to individuals. In order to reach the final destination, pellets are generally placed in 40 pound bags.

7. Some manufacturers of wood pellets place the pellets in bags at the manufacturing facility and then ship them in boxcars by rail to New England. The manufacturers have learned that unless the bags are placed on pallets and shrink-wrapped, there will be substantial damage, in the nature of broken bags and the creation of extra dust by the friction of wood pellets rubbing against one another, unless the pallets are blocked and braced--sometimes referred to as "dunnage"--in order to limit movement during the course of the rail transportation. The blocking and bracing materials take up space in a boxcar and weigh approximately 4000 pounds per boxcar,

which means that there is less capacity for pellets themselves. In addition, the blocking and bracing material needs to be disposed of at the end of the trip.

8. Transportation of pellets by truck for long distances tends to be much too expensive compared to rail. As a general proposition, one railcar has the capacity of 4 trucks. The trucks also have the same problem as boxcars in the sense that there tends to be damage en route unless blocking and bracing measures are taken. It is possible to ship the pellets by tanker truck, which is similar to a rail hopper car, but this is more costly than rail due to the 4 to 1 ratio mentioned above.

9. The pellet manufacturers have learned that long-distance shipment of the wood pellets in rail hopper cars is by far the most efficient and least costly means to transport pellets to the consuming markets. The G&U facility at Upton is able to unload pellets from the hopper cars, using a conveyor system to place the pellets into bags, and automatically put the bags on pallets and shrink-wrap the pallets so that they can be delivered to their final destinations by truck. The procedure used to transload and bag pellets is very similar to the procedure used at many railroad yards to transload plastic pellets. Typically, plastic pellets arrive in rail hopper cars and are transferred into bags or boxes for further distribution.

10. At the present time, G&U handles wood pellets for 2 customers --Viridis and another pellet company --each of which provide about 50 % of the wood pellet transloading business at the yard. Approximately 50% of the hopper cars arriving at the Upton yard are marked "Dana Rail Care". It is my understanding that these cars are owned by a Dana controlled company and leased to Viridis. The other 50% of the hopper cars coming into Upton have various railroad and private ownership markings, such as

CSX, Canadian National, Pinnacle and Canadian Pacific. As is the case with any commodity shipped to Upton, the customers and the originating rail carriers determine which railcars they will use. Viridis tends to sell to the retail distributors of wood pellets. Our other major pellet customer usually sells directly to the ultimate consumers and generally selects truckers other than Dana.

11. I have seen advertising material put out by Viridis that talks about a "partnership" involving G&U. G&U has no contractual relationship or partnership with Viridis. The only relationship is that of rail carrier and customer. G&U provides rail transportation services, including line haul services to the yard in Upton and transloading from hopper car to trucks at Upton. As explained above, Viridis understands that the Upton yard is an open terminal and that we serve other wood pellet customers.

12. Contrary to the speculation of the Petitioners, there is no storage of truck tankers at the Upton yard. Trucks may sit empty prior to loading, but G&U does not charge any trucker for storage. Similarly, there is no railcar storage at Upton. Railcars may be on the yard tracks until they are fully unloaded or loaded, which may take several days and sometimes longer, but this is a temporary condition that is not the subject of any storage charges except in accordance with the typical track occupancy charges for private cars and the demurrage provisions for railroad owned cars as set forth in G&U's tariff.. Also, although we have mentioned railcar washing as a potential service, G&U does not perform any washing at the Upton yard.

13. The Petition refers to the G&U Service Terms and Conditions (Exhibit 25 submitted by the Petitioners). These Service Terms and Conditions were canceled and removed from the G&U website approximately 4 months ago and are no longer in effect.

They have been replaced by the G&U Tariff 5000 dated May 1, 2012, which covers the rules and pricing for transloading services at Upton. A copy of the tariff was submitted as the Petitioners' Exhibit 24. Contrary to the Petitioners' allegations, G&U is not attempting to deny its responsibility as a common carrier for loss and damage claims. Like most rail carriers, G&U includes in its tariffs provisions intended to limit its liability for loss and damage, but ultimately G&U expects to have responsibility for loss and damage in accordance with 49 U.S.C. 11706 and other relevant provisions that apply to loss and damage claims against rail carriers.

14. The G&U Tariff 5000 establishes the maximum charges for the transloading services at the yard. Grafton Upton Railcare may want in certain circumstances to assess lower transloading charges in order to meet competition, and in those situations they confer with me. If it makes sense to reduce the charge in order to accommodate a customer and retain or gain the business, G&U makes the ultimate decision whether to do so.

15. Grafton Upton Railcare bills G&U's customers, as agent for G&U, for the transloading services performed at the yard. As a short line partner of CSX, G&U does not do any billing for its line haul services. All of the billing and collection from the customer is performed by CSX, which then remits G&U's share of the line haul revenue. Consequently, G&U does not have the personnel or systems in place to efficiently bill and collect for the transloading services, and we determined that it would be more convenient and efficient to have Grafton Upton Railcare take care of this function as our agent.

VERIFICATION

State of Rhode Island

ss:

County of Washington

I, Eric Moffett, being duly sworn, depose and state that I am President of Grafton & Upton Railroad Company ("G&U"), that I am authorized to sign the foregoing Verified Statement on behalf of G&U, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

Eric Moffett

Subscribed and sworn to
before me this 14 day of
August, 2012

Notary Public

RYAN HARRINGTON
NOTARY PUBLIC
STATE OF RHODE ISLAND
MY COMMISSION EXPIRES 4/22/2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
RONALD DANA

1. My name is Ronald Dana and I am a principal and executive officer of a group of companies referred to as "the Dana Companies" although it is not a separate legal entity. The Dana Companies are a group of companies involved primarily with the provision of motor carrier transportation, equipment leasing and logistics services. As an officer of the various Dana Companies, I am familiar with their operations generally, and more specifically with their operations as they may relate to the business conducted by the Grafton & Upton Railroad Co. ("G&U") at its railyard in the town of Upton. I have also reviewed the Petition filed by certain residents of the town of Upton in this proceeding.

2. I formed Grafton Upton Railcare, LLC ("GU Railcare") to provide transloading services for and on behalf of the G&U at the Upton railyard. The manager of GU Railcare, Michael J. Polselli, is providing a separate verified statement with respect to GU Railcare and its operations.

3. The Petition names a number of other Dana Companies and describes what it purports is the role of such companies with respect to the Upton railyard. These descriptions are inaccurate, and this Verified Statement is being provided to accurately describe the companies and the current services, if any, that are being performed at or in connection with the G&U railyard.

4. The Dana Companies identified in the Petition and their relationship, if any, to the G&U and to the Upton railyard, are as follows:

(a) Dana Transport, Inc. is a trucking company that provides motor carrier services nationwide. Dana Transport currently provides some delivery services for 13 customers from the Upton railyard, 12 customers are shipping bulk liquids, and one customer is shipping wood pellets. Dana Transport is not the exclusive provider of motor carrier services for these customers – many have their own private fleet of tank trucks, and many also use other common carrier trucking companies as well as Dana Transport. Dana Transport picks up the freight, all of which arrives by rail in tank or hopper cars, and delivers it as specified by the customer. All of the freight is transloaded by GU Railcare from the rail cars in which it arrived into or onto the trailers to be used by Dana Transport. At times Dana Transport will use trailers and equipment owned by its affiliates Suttles Truck Leasing, LLC or Liquid Transport Corp.

(b) Dana Rail Care is a marketing name used by Dana Container, Inc. for the repair, maintenance and cleaning of liquid tank cars at its Wilmington, Delaware facility. It does not perform any services at the Upton railyard. The "Dana RAILCARE" which appears on railcars owned by Dana Companies does not refer to or indicate ownership by Dana Rail Care; rather it is used as a trade name to generally advertise rail

related services that the Dana Companies can provide. As described more fully below, International Equipment Leasing, Inc. is the Dana Company which owns rail cars and leases them to international customers. Dana Container, Inc. owns rail cars and leases them to US domestic customers.

(c) Liquid Transport Corp. is a trucking company that provides motor carrier services nationwide. It has not performed any pick up or delivery services for customers at the Upton railyard. It has not leased any property from G&U, nor does it store any equipment or trailers at the G&U railyard. However, the Dana Companies often share equipment and trailers as needed, and Liquid Transport Corp. equipment and trailers have been used by Dana Transport at the Upton railyard.

(d) International Equipment Leasing, Inc. is a company that owns and leases transportation equipment, including ISO tanks, truck trailers and rail cars, to international customers. (Dana Container, Inc. also owns and leases rail cars to U.S. domestic customers.) All of the Dana Companies' rail cars bear the private marks of "DNAX." The rail cars are used by the customers in interline service. International Equipment Leasing, Inc. currently has 6 covered hopper cars under lease to Viridis, a Canadian customer, which I understand are being used for the transportation of wood pellets to the Upton railyard. Dana Container, Inc. also has tank cars under lease to a domestic customer that are being used to ship acetonitrile to the Upton railyard.

(e) As noted in the Petition, Suttles Truck Leasing LLC has been integrated into Dana Transport. It was a trucking company that both provided motor carrier services and leased motor carrier equipment. Its equipment still bears Suttles

markings, and some Suttles equipment and trailers have been used by Dana Transport at the Upton railyard.

5. None of the identified Dana Companies, or any other Dana Companies are rail carriers.

6. Other than GU Railcare, none of the Dana Companies are involved in the provision of transload services by or on behalf of the railroad. The Dana Companies, in particular Dana Transport is available to provide logistics and motor carrier services to customers of the G&U who may request such services. The Dana Companies bill their customers for their services. Other than GU Railcare which is paid by G&U for its transloading services, none of the Dana Companies bills G&U for any services provided.

7. The Dana Companies do not lease any of the yard from G&U, nor do they use the Upton railyard as a truck or trailer storage facility. G&U does allow Dana Transport to park some of its trucks and trailers at the yard while they are waiting to be loaded with either liquids or freight that will be transloaded from rail cars delivered to the yard by G&U. In this regard, G&U treats Dana Transport in the same manner as it treats other trucking companies waiting to pick up freight from the railroad. This is a common arrangement in the railroad industry, and Dana Transport has similar arrangements at other railroad transload facilities where it picks up freight.

8. Dana Transport owns a 15 acre facility in nearby Grafton where it can store trucks and trailers and perform truck maintenance. It does not need to use the Upton railyard for such purposes.

9. Other than the transloading services being performed by GU Railcare, no Dana Companies are performing rail car services, or equipment maintenance at the Upton railyard.

10. The Upton railyard is clearly not a Dana Company facility. In fact, neither GU Railcare (nor the Upton railyard) appear on the Dana Companies website. A copy of a list of our companies from our website is attached to the Petition as Exhibit 10, Vol.2, p. 31. G&U may have noted the availability of Dana Transport services as part of its marketing of the Upton railyard; however Dana Transport has no contractual relationship with G&U and does not perform any service for G&U. Any description of Dana Transport as a contractor to G&U is in error. G&U does not pay Dana Transport for any services, nor does Dana Transport pay G&U for any services. All of Dana Transport's services are billed to and paid by the customers for whom it performs the services.

VERIFICATION

I, Ronald Dana, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 20, 2012

Ronald Dana

Kathleen M. Murphy
Notary Public

KATHLEEN M. MURPHY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 25, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
MICHAEL J. POLSELLI

1. My name is Michael J. Polselli, and I am the New England Regional Manager for the Dana Companies. The "Dana Companies" is not a separate legal entity, but rather is a group of companies formed by Ronald Dana. One of the Dana Companies is Grafton Upton Railcare. LLC ("GU Railcare"). In my capacity as New England Regional Manager, I am responsible for the management and operation of GU Railcare. I am familiar with the transloading operations at the Upton railyard of Grafton & Upton Railroad Co. ("G&U"), the contract between GU Railcare and G&U, and with the Petition filed by certain residents of the town of Upton in this proceeding before the Surface Transportation Board ("STB").

2. GU Railcare was formed for the purposes of performing transloading services for and on behalf of G&U at the Upton railyard. G&U and GU Railcare entered into a confidential Terminal Transloading Agreement (the "Transload Agreement") to define the relationship between the parties and the services to be provided by GU

Railcare for G&U. I understand that a copy of the Agreement is being submitted by G&U to the STB under seal.

3. GU Railcare is responsible for performing all transload services to or from rail cars moved to or from the Upton railyard.

4. Currently there is one customer who is transloading liquids for outbound moves by G&U from the Upton railyard. The customer supplies its own trucks, and its employees do the transferring of the liquids into the tank cars. GU Railcare supervises the process.

5. Currently there are approximately 15 customers utilizing G&U transloading services at the Upton railyard. In July 2012, 84 railcars were transloaded in the railyard by G&U – 72 of those cars were inbound tank cars of bulk liquids of various types that were unloaded, 6 of those cars were inbound covered hoppers of wood pellets that were unloaded, and 6 of those cars were outbound tank cars that were loaded with bulk liquids. The bulk liquids include edible soybean oils, bio fuel (non-hazardous), flammable solvents, nitric acid, phosphorous acid, styrene, and alcohols.

6. G&U handles all of the movement of cars within the railyard. GU Railcare's services are limited to the transloading of the freight to and from railcars. GU Railcare performs no independent or additional services of any type at the Upton railyard or elsewhere.

7. GU Railcare has the obligation under the Transload Agreement to select motor carriers to handle the movement of the freight that has been unloaded from railcars if the customers do not do so. In practice, the customers have selected their own motor carriers. Currently, there are approximately 17 motor carriers that are handling loads at

the Upton railyard, including customers that are providing their own equipment. Dana Transport, Inc. is one of the motor carriers providing services to transload customers. I estimate that it handles about 25% of the outbound loads.

8. G&U and GU Railcare permit motor carriers providing services to transload customers to temporarily place their equipment and trailers at the railyard in anticipation of loading for outbound moves. There is no charge for making the property available for this purpose.

9. The rates to be charged for transload services are set forth in the G&U tariffs. Lower prices can be negotiated with customers as a contract rate if the circumstances dictate. GU Railcare will have the initial discussions with the customer; however, any rates other than those set forth in the tariff must be approved by G&U.

10. GU Railcare prepares and sends out the bills to customers for the transload services on behalf of and as the agent for G&U.

11. GU Railcare does not advertise the Upton yard, the services of G&U or the services GU Railcare provides at the yard. All advertising is the responsibility of G&U.

12. The transloading of bulk liquids involves attaching a hose to the tank car, and pumping the liquid through a meter (to measure the amount of liquid transloaded) directly into a tank truck.

13. The transloading of wood pellets also involves the use of a hose to remove them from the rail cars. However, the wood pellets cannot be directly transloaded into trucks. GU Railcare attaches a vacuum hose to the bottom of the cars which sucks the wood pellets through a system that removes dust and broken pellets, and then into silos

which provide temporary storage of the wood pellets until they are ready to be loaded onto trucks. There is no cleaning or washing or processing of the pellets. Any dust and broken pellets that are collected are disposed of as waste. They are not recycled or processed in any way for any purposes, including "repelletizing, "

14. The wood pellets are then moved by a conveyor, automatically bagged in 40 pound bags and stacked 50 to a pallet. The pallets are shrink-wrapped so that they will be ready for truck transportation, and then moved to a staging area where they can be loaded in trucks for final delivery by the customer.

15. GU Railcare does nothing to the wood pellets that could be considered manufacturing or processing, it merely bags the wood pellets as part of the handling of the pellets and preparing them for further transportation by truck.

16. There are currently two rail customers that are shipping wood pellets to the Upton railyard. The covered hoppers in which the wood pellets arrive include cars with carrier and private marks, including cars of CSX, Canadian National, Canadian Pacific, Dana Railcare, Pinnacle and LaCrete. It is up to the customer to arrange for railcars to handle the product; that is not done by G&U or GU Railcare.

VERIFICATION

I, Michael J. Polselli, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 20, 2012

Michael J. Polselli

My Commission Expires 2/11/16

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLY, ANDREW WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
DOUGLAS MIDDLETON

1. My name is Douglas Middleton, and I am the North American Manager for Viridis Energy, Inc. ("Viridis"). My responsibilities include the residential home heating program, sales, marketing and logistics, including arrangements for transportation. I have reviewed the Petition filed in this case and in particular the references to Viridis in the Petition.

2. Wood pellets have been around since the mid-1970s, but they became much more popular in the late 1990s. Wood pellets are used as an alternative source of heating fuel. Based on my experience, the principal markets for the sale of wood pellets at this time are New England for residential heating and Europe for industrial use.

3. The manufacturing process for wood pellets begins with wood fiber, including sawdust and logs as the raw material. Most of the wood fiber used for pellets is actually sawdust and other waste from sawmills. The wood fiber is first "hammered", or literally pounded, and then dried, either in kilns or air dried. When the moisture content of the

wood fiber is at the right level, the fiber is rolled and squeezed through a die, producing pellets that are approximately the same size as rabbit food.

4. Viridis' only operating manufacturing facility is located in Kelowna, British Columbia. Because our markets are in New England and Europe, transportation logistics has become a very important issue for us. Until recently, the wood pellets produced in British Columbia were put in 40 pound bags at our plant, placed on pallets, shrink-wrapped and then loaded into rail boxcars. It is necessary to bag and palletize wood pellets for shipment in boxcars in order to minimize damage in the form of broken bags, which require rebagging and extra time unloading boxcars.

5. The maximum weight over much of the North American rail system for a rail car is 263,000 pounds. If a boxcar is loaded with pallets of wood pellet bags, we found that we could ship only approximately 88 tons of pellets in each boxcar. The space taken up by the pallets and other materials needed to block and brace the pallets, as well as unused space within the boxcar, resulted in a very inefficient use of the boxcar. Viridis formerly shipped boxcars of wood pellets to other locations in Massachusetts, including Monson, Worcester and Allston, but we found that the transloading and bagging services of the Grafton & Upton Railroad ("G&U") at Upton, Massachusetts afforded a much more efficient and less costly means of transporting the pellets, as described below.

6. We have started using the G&U yard in Upton to ship pellets in bulk loaded into rail hopper cars. The hopper cars can accommodate approximately 105-107 tons of pellets, or approximately 20 more tons than we could ship in a boxcar. In addition, using hopper cars and performing the bagging in Upton has eliminated the damage that was common in the use of boxcars. Consequently, as a matter of transportation logistics,

lowering transportation costs and minimizing damage expense, Viridis has opted to use hopper cars and transloading at Upton rather than boxcars. Without this option, we would not be in a position to compete in the New England market.

7. There is no change in the composition or nature of the wood pellets between the time that they are manufactured in British Columbia and the time that they are delivered by truck to our customers in New England. As part of the transloading and bagging process, the pellets are screened and vacuumed in order to remove dust and "fines"--pieces of pellets that are too small--prior to bagging. The manufacturing process has been fully completed, however, when the pellets leave British Columbia.

8. I am familiar with a press release that Viridis issued when we began shipping by hopper car to Upton. While the press release mentioned a "partnership" among Viridis, G&U and Dana Transport, there is no formal, contractual relationship among the 3 parties. Rather, we were referring to a working relationship that combined Viridis, as the manufacturer of wood pellets, G&U as the rail transportation provider, and Dana Transport as the principal trucking company used by Viridis to make deliveries from the transloading facility at Upton.

9. Viridis has leased 6 hopper cars from International Equipment Leasing, Inc.. We pay rent for the cars, and we have the ability to use them wherever we want. We also use railcars provided by others, including the rail carriers that originate or participate in pellet shipments from British Columbia to Upton.

VERIFICATION

State of Arizona

ss:

County of Maricopa

I, Douglas Middleton, being duly sworn, depose and state that I am the North American Manager for Viridis Energy, Inc. ("Viridis"), that I am authorized to sign the foregoing Verified Statement on behalf of Viridis, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

Douglas Middleton

Subscribed and sworn to before me this __ day of August, 2012

Notary Public

ROBERT TOLNAI
Notary Public - Arizona
Maricopa County
My Comm Expires Sep 21, 2015

STATE OF ARIZONA
COUNTY OF MARICOPA } SS.

This instrument was acknowledged before me this 14th day of August, 2012, by Douglas Middleton
in witness whereof I herewith set my hand and official seal.

NOTARY PUBLIC